

BILATERAL INVESTMENT TREATIES (BITs) IN THE ENERGY AREA OF THE EU: ONGOING ISSUES

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The power in energy sector: shared competence

- ▶ Art. 4 TFEU
- ▶ 1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
- ▶ 2. **Shared competence** between the Union and the Member States applies in the following principal areas:
 - ▶
 - ▶ (i) energy;

The role of the Union

- ▶ Art. 194 TFEU
- ▶ 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, **Union policy on energy shall aim, in a spirit of solidarity between Member States, to:**
 - ▶ (a) ensure the functioning of the energy market;
 - ▶ (b) ensure security of energy supply in the Union;
 - ▶ (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
 - ▶ (d) promote the interconnection of energy networks.
- ▶ 2. Without prejudice to the application of other provisions of the Treaties, **the European Parliament and the Council**, acting in accordance with the ordinary legislative procedure, shall establish the **measures** necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

The role of the Member States

- ▶ Art. 194 TFEU
- ▶ Such measures shall not affect a **Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).**

Limitation to the power of the Member States

- ▶ Art. 192 TFEU
- ▶ 2. By way of derogation from the decision making procedure provided for in paragraph 1 and without prejudice to Article 114, **the Council acting unanimously** in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:
 - ▶ (a) ...
 - ▶ (b) ...
 - ▶ (c) **measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.**

The power for foreign investment

- ▶ Art. 3 TFEU
- ▶ 1. The Union shall have **exclusive competence** in the following areas:
 - ▶
 - ▶ (e) common commercial policy.

- ▶ Art. 207 TFEU
- ▶ 1. **The common commercial policy** shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, **foreign direct investment**, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.
- ▶ 2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

The current situation regarding BITs in Energy Area

- ▶ Decision 2017/684 of the the EP and of the Council, “establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy” (IGA Decision)
- ▶ Decision 994/2012/EU of the EP and of the Council, “establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy” (previous IGA Decision)
 - ▶ MS obliged originally to submit by 17.2.2013 all existing “intergovernmental agreements” (IGAs) between a MS and one or more third countries having an impact on the operation or the functioning of the internal energy market or on the security of energy supply in the Union (legally binding agreements). IGAs concerning matters of the Euratom Treaty were excluded.
 - ▶ Main objectives of the previous IGA Decision
 - ▶ compliance of IGAs with EU law
 - ▶ coordination between MS with regard to IGAs
 - ▶ Impact of the previous IGA Decision on MS’s negotiations with third countries

notified IGAs under the previous IGA Decision

- ▶ 124 IGAs have been notified to the Commission. Only one IGA has been signed after the entry into force of the previous IGA Decision (Report from the Commission, COM(2016) 54 final)
 - ▶ 60% of the 124 notified IGAs covering general energy cooperation between EU MS and a wide range of third countries (e.g. China, India, Cuba, Vietnam, Singapore or Korea)
 - ▶ 40% of the 124 notified IGAs related to energy supplies (oil, gas or electricity) or energy infrastructure

Assessment of IGAs regarding compatibility with EU law

- ▶ The first category of the 60% of the 124 notified IGAs covering general energy cooperation between EU MS and a wide range of third countries (e.g. China, India, Cuba, Vietnam, Singapore or Korea) raised no concerns
- ▶ From the second category of the 40% of the 124 notified IGAs, 17 of the agreements raised questions of compatibility with EU law [e.g. **EU energy regulation** (unbundling third party access and tariff settings, independence of the national regulator) and **EU competition law** (prohibition of market segmentation by means of destination clauses).
 - ▶ Letters sent in 2013 to 9 MS in order to amend or terminate the IGAs in question

Treaties predating the EU Treaties

- ▶ *Article 351*
- ▶ The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
- ▶ To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to **eliminate the incompatibilities** established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, **adopt a common attitude**.
- ▶ In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

Internal Consequences of the Transfer of Powers

- ▶ Duties derived from arts. 4.3 TEU and 351 TFEU
 - ▶ Duty of the member states to act as trustees for the Union in solidarity as guided by the community organs (ERTA decision)
 - ▶ Duty to mutual coordination between MS and EU if they are both members of a treaty or an international organization („mixed agreement in the case of shared powers“, Opinion 2/91)

BITs : state of affairs

- ▶ The Regulation 1219/2012, establishing transitional arrangements for BITs between MS and third countries, recognizes the rule “pacta sunt servanda”: existing BITs remain binding on the MS.
- ▶ C-264/09, European Commission v. Slovak Rep. ‘...if a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot be excluded’.

BITs, NEW GENERATION OF FREE TRADE AGREEMENTS in Energy sector and EU LAW: recent developments

- ▶ Shared competence for non-FDI (Opinion 2/15)
- ▶ New generation of free trade agreements replace BITs (Opinion 2/15)
- ▶ Arbitral provisions of the intra-BITs
 - ▶ Achmea (C-284/16): Incompatibility with art. 344 TFEU et 267 TFEU
- ▶ Dispute Settlement mechanism in the new generation of free trade agreements with the Union's partners (e.g. CETA, TTIP, etc.)
 - ▶ Competence of the MS for the conclusion of arbitral provisions (Opinion 2/15)
 - ▶ Question from Belgium for an Opinion of the Court on the ground of art. 218, par. 11 TFEU concerning especially the respect of the autonomy of EU legal order.

Reasons of ineffectiveness of the previous IGA Decision

▶ Deficiency due to:

▶ Ex-post nature of the compatibility check

- ▶ no transformation of concluded non-compliant IGAs into compliant ones : after the conclusion of an IGA MS are binding under public international law
- ▶ no IGA negotiations by MS or political commitments (e.g. in the form of MoU, exchanges of notes or letters of intend) have been notified, since they fall outside the scope of the previous IGA Decision
- ▶ no voluntary submission of any draft IGA for ex-ante check
- ▶ reveal disparities between MS concerning methods of purchase of energy commodities [e.g the gas purchase in some MS (Baltics and Southeast Europe) is still based on the price setting is based on long term oil indexed contracts while in MS of Central and Northwestern Europe has shifted to a market based mechanism, i.e hub pricing]

Internal measures for preventing eventual incompatibilities of IGAs with EU law

- ▶ different levels of bargaining power of MS towards third countries, and
- ▶ different levels of exposure to external pressure, which underline **lack of consistency and coherence in the Union's external energy relations with producer, transit and consumer countries;**
- ▶ Adoption of the IGA Decision
 - ▶ Ex-ante involvement of the Commission for the compatibility checks of IGAs
 - ▶ Information of the Commission on the intention of MS to enter into negotiations
 - ▶ Notification of IGAs and non-binding instruments in the field of energy
 - ▶ Assistance of the Commission
 - ▶ Necessary reaction of the Commission before the conclusion of IGAs
 - ▶ Next Report of the Commission in the beginning of 2020